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IN THE

Supreme Court of the United States

October Term, 1960.

No. 416

GENERAL ELECTRIC COMPANY,

Petitioner

vs.

HENRY D. GREPKE,

Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondents respectfully pray that the Court deny the Petition for Writ of Certiorari to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit affirming the jury verdict in favor of the plaintiff in the District Court for the Northern District of Indiana.

OPINION BELOW.

The opinion below is not yet officially reported, but is as appears in the petitioner's appendix.

JURISDICTION.

The respondent accepts the petitioner's statement of jurisdiction.

QUESTIONS PRESENTED FOR REVIEW.

The respondent is not satisfied the proposed statement of the issues presented by the petitioner are accurate, but would re-state them as follows:

(1) Whether the uncorroborated testimony of an interested third person and employee, Mr. Pugh, that he subsequently independently conceived the invention, requires a directed verdict consistent with the affirmative defense of independent invention, or whether this is a question upon which reasonable men may differ.

(2) Whether there was a complete absence of credible evidence on damages, or whether the evidence and the inferences reasonably made therefrom were sufficient to support a jury verdict of $5,000.00?

(3) Have the Circuit Court of appeals and the District Court decided an important State or Territorial question in a way in conflict with the state or territorial law or so far departed from the acceptable and usual course of judicial procedures as to call for an exercise of this Court's supervision? Rule 19 (1)(b).

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The Statement of Facts included in the petition are incomplete and in certain particulars at variance with the transcript. Also, the petitioner implies omissions of testimony where testimony in fact existed on particular points. For a more accurate analysis of the transcript of evidence the Court is respectfully referred to the Opinion of the Circuit Court of Appeals, reported in full in the Appendix to the Petitioner's Brief.

At Page 3 of his brief, the petitioner suggests this case is important in that the operation of the "Suggestion

System of General Electric Company" was passed upon. Such was not the case. Although a "suggestion system" was made reference to on several occasions, there was neither an attempt to introduce it in evidence, introduce it into the pleadings, nor to determine its legal effect; the facts assume no written contract or agreement existed limiting the rights of the parties as is oftentimes known to occur in industry. It was assumed throughout the trial and on appeal that there was no written or oral agreement and the case was not controlled by any "suggestion rules." The existence and the legal effect of such a system is, therefore, not a question before the Court.

At Pages 3 and 4 of the brief, the petitioner suggests that for the plaintiff to recover, it was encumbent upon him to prove the method adopted by General Electric Company was "identical" to the plaintiff's invention. Such was not the case. The test was properly set out, and presented to the jury in defendant's Instruction Number 1, to-wit:

> "You are instructed that the burden of proving such methods are substantially equivalent or similar, is upon the plaintiff, and if you find from a fair preponderence of the evidence that such methods are not substantially equivalent or similar, and that the defendant's present method differs in material respects from that suggested by the plaintiff, you should find against the plaintiff and for the defendant, General Electric Company."

At Page 4 of his brief, the petitioner suggests the plaintiff testified his invention consisted simply of inserting balancing wedges from the top rather than the side. In fact, the plaintiff's description of the invention submitted and the description of that adopted by the General Electric Company was far more detailed. The weights had to be clipped on one side (R. 48, 62, 239), filed or rounded off or

bevelled (R. 48, 62, 239) in order to fit into the armature and snap into the corner of the slot when staked with a staking tool (R. 48, 62, 239). It was this invention which the jury found to be the same or substantially equivalent to that used by the defendant (R. 200-201).

Mr. Pugh, of course, testified he did not depend on any invention in possession of his principal. But the implication at Page 5 of the petitioner's brief, that Mr. Pugh's testimony was corroborated, is inaccurate. His supervisor did not corroborate him, but stated simply that he did not recall discussing the invention with either Mr. Grepke or Mr. Pugh (R. 230, 231). He did admit that he was the plaintiff's foreman in 1940, and that he had passed upon inventions in that capacity (R. 232). It was true, that there was testimony certain files were destroyed by the defendant, but it was further testified to that in 1953, prior inventions were turned over to departments in which they could be expected to be used (R. 34). In 1953 Mr. Pugh and Mr. Wickliffe were both in the very department where this invention was finally used (R. 199, 229).

The whole of the petitioner's argument at pages 6-9 of his brief, is premised on the supposition there lacked proof of access. Such was not the case. It was established that in 1953, the year Mr. Pugh was working on the invention, all old inventions were referred to the respective departments where the invention would be used (R. 34). There seems no question that an invention concerning armature balancing would have been sent to Mr. Pugh's department, the Armature Balancing Department, finishing armature section, Department 401, Division 1, Building 4 (R. 199, 229). The defendant-employee in charge of the files testified that "planning men or engineers" had "access" to files if they requested it (R. 23, 24, 32). Planning people, spotted around in different departments, would sometimes put "good ideas" away "somewhere for future reference"

(R. 33, 37). It was only the use of these available avenues which was denied by Mr. Pugh, not the existence of the avenues or the access. In fact, it is difficult to see how access could have been more definitely proven and established. The invention was at all times in possession of the defendant and the question of access to it was properly for the jury.

SPECIFICATIONS OF ERROR.

The petition raises no question concerning the existence of the communication, the new and novel nature of the invention, the existence of a position of confidence, the expectation of compensation, and the substantial similarity of the invention communicated and that used, all of which questions were previously raised. This argument, therefore, is limited simply to the questions raised, Pugh's testimony and the damages, concerning which neither the District Court nor the Circuit Court of Appeals erred.

ARGUMENT.

A. The Weight to Be Given Pugh's Testimony Was Appropriately Left to the Jury.

Pugh orally testified that he independently invented the invention which the jury found to be substantially similar to the plaintiff's. No documentary evidence was introduced. Pugh was an employee of the defendant, interested by the fact that he claimed prior inventive rights over the plaintiff. As the person claiming to have conceived the new invention, having already presumably been compensated for it, and still employed as a cost improvement expert, he was an interested party in the outcome of the litigation about whose testimony reasonable men might quite logically differ. His testimony, therefore, submitted as a part of an affirmative defense by the defendant was for the jury. The rule is clear that where a defendant seeks independent invention by oral testimony, the proof sustaining it must be clear and satisfactory, and he ought to offer something of greater weight than verbal testimony of interested witnesses.

Adamson v. *Gilliand*, 242 U. S. 350 (1916).

The Barbed Wire Patent, 143 U. S. 275 (1891).

> "The defendant contends that it should not be held liable for damages for breach of the confidential disclosure, because it says that its construction was the result of independent effort on the part of its employees and was not derived from the disclosure by the plaintiff; there is evidence on the part of employees in support of this contention; but this evidence is not convincing * * *" *Ackerman* v. *General Motors Corp.*, 202 F. (2) 642 (4th Cir. 1953), Cert. Den. 345 U. S. 966, Reh. Den. 346 U. S. 842.
>
> "It is well settled, that where an unpatented device,

the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory and beyond a reasonable doubt.

"And we think the same rule should be applied against one who admittedly receives a disclosure from an inventor, proceeds thereafter to manufacture articles of a similar character, and when called to account, makes answer that he was using his own ideas and not the ideas imparted to him." *Ibid.*, 202 F. (2) at p. 648.

"What was said by the Supreme Court in *Atlantic Works* v. *Brady*, 107 U. S. 192, 203, 2 S. Ct. 225, 234, 27 L. Ed. 438, when dealing with the contention of one Brady that he was the inventor * * * is applicable to the testimony of employees of the defendant, viz: 'Interested as he is in the result of the suit, his testimony cannot be allowed to prevail against a course of conduct so utterly at variance with it'." *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) 912, 923, 4th Cir. 1935, Cert. den. 298 U. S. 673.

"One who invites the disclosure of an invention and thereafter begins to manufacture articles embodying the principal of the disclosure, labors under a heavy burden when he seeks to justify his action on the grounds of independent invention and he ought to offer something of greater weight than verbal testimony of interested witnesses" *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) at p. 923.

Shellmar Products Co. v. *Allen Qualley*, 87 F. (2) 104, 36 F. (2) 623, 31 F. (2) 293 (7th Cir.), Cert. Den. 301 U. S. 695.

A. O. Smith Corp. v. *Petroleum Iron Works*, 74 F. (2) 935 (6th Cir. 1935).

The defendant's second affirmative defense is that of independent invention. In support of this defense, Pugh testified and denied use of the prior invention communicated to his employer. Throughout the trial, and on various motions, defendant has consistently argued that this testi-

money must be accepted as a matter of law. That it has long been recognized that such testimony does not take the trier of fact from the jury as to the question of the plaintiff's priority.

> "There will seldom be direct evidence of plagarism and necessarily the trier of fact must rest upon circumstantial evidence and the reasonable inference which may be drawn from it to determine the issue."
>
> "Defendants deny access and copying. Access may, however, be proved indirectly. A charge of piracy does not fail merely because the infringer was not caught in the act of copying. Access may be inferred from surrounding circumstances or it may be found from similarities in plan arrangement and combination of materials, or from identity of phraseology or from other evidentiary facts * * * The weight given the inference against direct evidence of non-access or non-copying is a question for the trier of fact." *Golding v. R. K. O. Pictures*, 221 P. (2) 95, 35 Calif. (2) 690 (1950) at 98, and see case cited *supra* at pp. 6 and 7.

Under these circumstances, it was entirely appropriate that the question involved be presented to the jury. If anything, one might argue that the motion could be directed against such testimony. That position is not necessary, however, as it is sufficient to say that the proof of access as it exists in the transcript of evidence, together with all other surrounding circumstances, including the degree of interest on behalf of Pugh, constitutes an issuable fact for the jury. It is important to note that the record not only contains this minimal amount of evidence necessary to present an issuable fact under the law, but the record additionally substantiates a great degree of identity between the invention adopted and that submitted, coupled with the similarity of the material used in experimentation (R. 62, 199), and the identical experience of both inventors in overcoming common obstacles (R. 67, 205).

B. The Court Projerly Refused to Direct the Verdict As Evidence Exists in Support of the Plaintiff's Prima Facie Case.

The verbal denial by Pugh of the use of the plaintiff's prior invention is given in support of the second affirmative defense and is not a part of the plaintiff's *prima facie* case. Thus, to reach the question presented, it must be admitted that the plaintiff has met the burden of establishing his *prima facie* case. The true position of the defendant is, therefore, that although the plaintiff established his *prima facie* case, the Court should have directed a verdict of the second affirmative defense alleged in the defendant's answer. But the Court properly refused to do so because, at best, this testimony creates only a conflict of the evidence as to whether the inventions were the same.

> "* * * (sets out) * * * the general picture of an action of this nature, holding the essential elements to be; (1) the existence of the trade secret, (2) communicated to the defendant in confidence, (3) while he is in a position of trust and confidence, and (4) the use by the defendant to the injury to the plaintiff." *Smith* v. *Dravo*, 203 F. (2) 369, 373, 208 F. (2) 388 (7th Cir.).
>
> "As a general rule, the similarity standing alone, is an adequate basis upon which to find misappropriation." *Ibid.*, 203 F. (2) at p. 377.
>
> "If there is any disadvantage that he knew the plaintiff's secrets, he must take the burden with the good." *Ibid.*, 203 F. (2) at p. 376.
>
> "The similarity of the defendant's device to that of the complainant is strong proof that one was copied from the other." *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) 912, 924 (4th Cir. 1935), Cert. Den. 298 U. S. 673.
>
> "* * * Liability for damages must rest upon substantial evidence of similarity between the plaintiff's literary property and the moving picture produced by

the defendant." *Golding* v. *R.K.O. Pictures*, 221 P. (2) 95, 35 Calif. (2) 690 (1950).

Booth v. *Stutz Motor Car Co.*, 24 F. (2) 416 (7th Cir. 1927).

It must be remembered this is an action against the defendant General Electric Company for the use of the plaintiff's invention contrary to the confidential relationship and is not an action against Pugh for intentional misappropriation. Thus, the gist of the action is the use of the plaintiff's invention in breach of the confidence, not an intentional wrongdoing or misdeed by Pugh. The sole question relating to Pugh as to whether his employer is entitled to have his affirmative defense sustained as a matter of law by reason of this oral testimony, or whether this testimony by Pugh that he in fact invented the invention, not Grepke, was for the jury.

The trial court had an opportunity to consider this question on the defendant's numerous motions, after having observed the demeanor of the witness, determined the extent of his interest and bias, and the probability and degree of his financial interest in the outcome of the case. The force of Pugh's testimony was carefully reviewed in the briefs, on appeal and in the prior arguments, and each time the existence of an interest on behalf of Pugh in the outcome of the litigation has led the Court to the only fair result—that his testimony was a part of the trier of the facts to the jury.

"The jury are not bound to believe anything to be a fact simply because a witness has stated it to be so, provided that the jury believes the witness was mistaken or testified falsely.

"It does not necessarily follow, however, that a verdict or finding must be in favor of the party introducing uncontradicted testimony, especially if such testimony discloses a variety of circumstances from which

different minds may reasonably arrive at different conclusions as to the ultimate facts, or if the uncontradicted testimony is that of an interested witness."

Carter v. *John Hennes Trucking Co.*, 210 F. (2) 443, 447 (7th C. C. A. 1953).

"Here, adequate reason for leaving the question of credibility to the jury lay in the fact that the chief witness had an obvious interest in the case * * *" *Milachak* v. *American Dredging Co.*, 266 F. (2) 875, 878 (3rd Cir. 1959), Cert. Den., 361 U. S. 901. 20 Am. Jur., Sec. 1180, p. 1030.

Annotation, Credibility—Court or Jury Question, 62 A. L. R. (2) 1191, 1199.

And see cases collected in Wigmore, The Law of Evidence, Sec. 587 and 2495 to the effect that the trial judge's preliminary determination of interest or bias should not be disturbed on appeal.

C. The United States District Court for the Northern District of Indiana and the Circuit Court of Appeals Properly Determined the Authorities Cited by the Petitioner Are Not Controlling.

The petitioner says, "the prevailing rule and precedent" is "ignored". Pet. Brief, p. 6. Presumably the petitioner intends to fit under the provisions of Rule 19 (1)(b), providing for the discretionary exercise of certiorari when the Circuit Court of Appeals has decided an important State question in a way in conflict with applicable state law. If this is so, no proper question is presented by the petition for writ of certiorari because not one Indiana case is cited in the petitioner's brief. Even if the decisions cited were applicable in Indiana, which they are not, it is difficult to see how they would be controlling. The cases are cited as follows:

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333 (1932), by Mr. Justice Sutherland re-

versing 49 F. (2) 986 (2nd Cir. 1931), and thereby affirming the trial court.

Chesapeake & Ohio Railroad v. *Martin*, 283 U. S. 209 (1931), by Mr. Justice Sutherland.

Moore v. *Chesapeake & Ohio Railroad Co.*, 340 U. S. 573 (1951), an opinion by Mr. Justice Minton affirming, 184 F. (2) 176 (4th Cir. 1951), and thereby affirming the trial court.

Sickles v. *Graybar Electric Co.*, 219 F. (2) 847 (7th Cir. 1955), Cert. Den. 350 U. S. 827, Reh. Den. 350 U. S. 905 (1955).

Each of the cases has been urged in both the trial Court and the Circuit Court of Appeals on at least three occasions each and on no occasion did either Court think them applicable. The reasons are obvious.

Pennsylvania Railway Co. v. *Chamberlain*, *supra*, was an action for damages for negligence. The brakeman plaintiff had evidently fallen from a freight car and been killed. The theory was that defendant's employees negligently caused a string of freight cars to collide, which caused the fall. "Three witnesses * * * corroborated by every other employee in a position to see all testified there was no contact." 288 U. S. at 336.

> "The plaintiff's only witness * * * professed to have paid little attention to what went on * * * heard what he described as a loud crash * * * not, however, an unusual event in the switching yard." 288 U. S. at 366, 367.

The trial judge thought the plaintiff had not made out his *prima facie* case, by failing to prove a collision occurred, and directed a verdict. Judge Learned Hand thought the question should have been submitted to the jury on inferences of a collusion from the crash, but this Court thought otherwise and sustained the trial judge's determination

that the *prima facie* case had failed and the question could be taken from the jury.

Moore v. *Chesapeake & Ohio Railway Co., supra*, was an action for negligence under the Federal Employers' Liability Act. The brakeman plaintiff had evidently fallen from a freight car and been killed. The theory was that defendant employees negligently made a sudden and unexpected stop which caused the fall into the path of an oncoming train.

> "The engineer was the only witness to the accident and was called to testify for the petitioner. He testified that he saw the decedent fall from the tender and that he made an emergency stop in an attempt to avoid injuring him. He testified that he received no signal to stop, had no reason to stop until he saw the decedent fall * * * (he) * * * never waivered in his testimony * * * (and) * * * all the evidence shows is that the decedent fell before the train stopped." 340 U. S. at 575, 6, 7.

The trial Court thought the plaintiff had not made out his *prima facie* case by failing to prove negligence. Both the Circuit Court of Appeals and this Court agreed that the trial judge could properly remove the question from the jury.

Chesapeake & Ohio Railway v. *Martin, supra*, was an action for damages for negligent and unreasonable delay. But there was no testimony that the delay was unreasonable and, therefore, the plaintiff failed in his *prima facie* case and the matter was removed from the jury.

Sickles v. *Graybar Electric Co., supra*, was an action for damages for negligence. The plaintiff carpenter had fallen from scaffolding and been injured. The theory was that defendant's employees negligently moved the scaffolding into a position of peril. There was, however, no evidence the defendant's employees had touched or been near the

scaffolding and therefore, again, there was no proof of negligence and the matter could have been taken from the jury.

Each case is an action for damages for negligence in which the plaintiff failed to prove negligence on the part of his *prima facie* case; ours is an action for the appropriation of a property right in an invention disclosed in confidence and is an entirely dissimilar case. Each case involves the question of whether the plaintiff has made out his *prima facie* case; the argument here must concede the plaintiff has made out his *prima facie* case, and only argues that a motion should have been directed after the defendant's testimony. The only question the petitioner urges is whether the defendant has sustained his second affirmative defense as a matter of law, the burden of which rests upon the defendant, not the plaintiff. None of the cases even intimate that the uncontradictable evidence of an interested witness in support of an affirmative defense must be accepted as a matter of law. In none of the cases is there any conflicting evidence at all, such as the evidence here is conflicting concerning the question of having access and the substantial similarity of the earlier invention. As the pleadings show we are dealing here with the defendant's burden, not the plaintiff's as was the question in each of these cases.

It is submitted, therefore, that none of the cases are authoritative for the proposition that an important state question has been determined in conflict with applicable state law and no appropriate showing is made under Rule 19 (1)(b).

D. There Is Evidence of Damages, the Amount of Which Was Properly for the Jury.

Discussing damages, the petitioner once again does not contend the decision is an important state question in con-

fliet with applicable law or is a departure from the accepted and usual course of judicial proceeding. Again no authority is cited. Damages are proven here in the only logical and possible way. No doubt, had the plaintiff submitted proof of the value of the invention to himself or others, the defendant would have objected just as strenuously as he objects to the present method. Like the other arguments advanced, the petitioner presents no mention of the cases relied upon by the Court. *A. C. Becker Co.* v. *Gemex Corporation*, 272 F. (2) 1, 5 (7th Cir. 1959); Cert. Den. 382 U. S. 864. Nor does he make mention of the recognized and authoritative cases involving the determination of damages in an action for the appropriation of property rights.

> "To the extent, therefore, that the Booth plan, communicated in confidence to Stutz, did enter into the design of the Stutz car, Stutz did inequitably appropriate the plans and should account to Booth therefor." *Booth* v. *Stutz Motor Car Co.*, 24 F. (2) 415 (7th Cir. 1928).
>
> "* * * the defendant ought not to be heard to say that he was in no way obligated to respect the confidence thus reposed in it." *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) 912, 922 (4th Cir. 1935), Cert. Den. 298 U. S. 673.
>
> "The doctrine of unjust enrichment or recovery in quasi contract, obviously does not deal with situations in which the party to be charged has by word or deed legally consented to assume a duty toward the parties seeking to charge him. Instead, it applies to situations where as a matter of fact, there is no legal contract, but only the person sought to be charged is in possession of money or property which in good conscience or justice he should not retain, but should deliver to another. (Citing cases.) Where this is true, the Courts impose a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong. (Citing cases.) The doctrine is applicable to a situation where, as here, the product of

an inventor's brain is normally received and used by another to his own great benefit without compensating the inventor. * * *

"The evaluation of this evidence was, of course, for the jury * * * 'the judge properly charged that recovery must be based upon reasonable value of the use of the devices and the reasonable value of the services rendered by the plaintiff * * *.

"Records containing this information were, of course, in possession of the defendant. Plaintiff did, however, prove the fact of damages; and the amount of damages could be determined as a matter of just and reasonable inference from the plaintiff's evidence." *Maltrese* v. *Moore-McCormack Lines*, 158 F. (2) 631, 634, 635 (2nd Cir. 1946).

"It is not the law that the defendant can be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars, the damage it has suffered." *A. C. Becker Co.* v. *Gemex Corp.*, 272 F. (2) 1, 5 (7th Cir. 1959), Cert. Den. 382 U. S. 864.

The Court is also respectfully referred to the fact the defendant introduced no evidence on the subject of damages. Also, no reversal was sought in the Circuit Court of Appeals for overruling the petitioner's motion for a new trial, thus obviating the only appropriate way to present the question of damages in the Appellate Court.

E. No Grounds Are Set Out for the Exercise of This Court's Supervisory Jurisdiction.

This was an action for the appropriation and use of an invention without compensation when it was disclosed in confidence with the understanding and expectation of compensation should it be used. It is an action well-known historically, *DuPont* v. *Masland*, 244 U. S. 100 (1917), well recognized in Indiana, *Ulman* v. *Thompson*, 57 Ind. App. 126, 106 N. E. 611 (1914), litigated frequently in the Seventh Circuit Court of Appeals, *Smith* v. *Dravo*, 203 F. (2) 369, 208 F. (2) 390 (7th Circuit), *Shellmar Products* v. *Al-*

len Qualley Co., 87 F. (2) 194, 36 F. (2) 623, 31 F. (2) 293 (7th Cir. 1929-36), and well analyzed in the annotations, 170 A. L. R. 449, 153 A. L. R. 983, 85 A. L. R. 1512, 44 A. L. R. 593, 32 A. L. R. 1037, and 16 A. L. R. 117. That there is no conflict among the decisions nor inconsistency with recognized Indiana law is demonstrated by the fact that the petitioner neither cites one 7th Circuit Court case in point nor makes reference to one Indiana case.

The defendant's four cases certainly present no question of great importance in the subject matter of this litigation. Each appeal there demonstrates a situation where the defendant need not proceed with his affirmative defense and testimony because the plaintiff has not made out his case. The exact contrary situation exists here when the burden of proving his second affirmative defense reposes on the defendant, not the plaintiff. As the plaintiff had made out his *prima facie* case long before Mr. Pugh took the stand it is difficult to see how these cases can be authoritative for the direction of a verdict on an affirmative defense supported only by the most interested and biased of testimony. If this were so in criminal cases the state's prosecution would have to fail in each instance where the malefactor denied the act of which he was accused. Certainly, under these circumstances, the degree of Mr. Pugh's interest and bias was appropriate for consideration by the trial court and for the jury.

This Writ of Certiorari is prayed for without referring to one case in point on the facts, completely ignoring all cases relied upon by the Circuit Court of Appeals and without making reference to any of the many cases in point heretofore decided by the Seventh Circuit. Aside from the fact the cases cited by the petitioner are not in point, it is, therefore, difficult to see how the petitioner can contend the District Court and the Circuit Court of Appeals both "* * * so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." Rule 19(1)(b).

No possible important point could be raised on certiorari. The arguments presented have only to do with the weight to be given conflicting evidence by the jury. Perhaps no more can possibly be said on that subject than has already many times before been said by this Honorable Court, the learned commentators and in this instance, by the Seventh Circuit Court of Appeals.

> "* * * where, as here, there is evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." (Citing from *Lavender* v. *Kurn*, 327 U. S. 645, 653.)

Such has long been the recognized and appropriate Indiana rule correctly applied by the Circuit Court of Appeals in this instance. Certiorari here would simply once again review the facts, already reviewed some five or six times, and lead this Court to the conclusion that the jury reached a determination entirely within its prerogative.

The only question, therefore, has to do with either the weight or credibility of the witnesses and in no way permanently affects either the General Electric Company or the industry as a whole. The re-determination of this case is a re-determination only of the rights between Grepke and the General Electric Company and serves no useful purpose for future litigation or judicial guidance.

WHEREFORE, respondents respectfully pray that the petition for writ of certiorari be denied, and for all other relief proper in the premises.

Respectfully submitted,

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